Supreme Court, U.S.
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Nos. 02-306 & 02-312

IN THE

Supreme Court of the United States

BENEFICIAL NATIONAL BANK and
BENEFICIAL TAX MASTERS, INC.,

Petitioners,

-and-

H & R BLOCK, INC.,

Petitioner,

v.

MARIE ANDERSON, *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit of Appeals was correct in refusing to expand the extremely limited doctrine of complete or field preemption to claims where the National Bank Act may provide a defense to a state law claim, and the law is that a case in which the plaintiff asserts only state law claims may not be removed to federal court based on a federal defense — even the defense of ordinary preemption. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 399 (1987) ("Congress has long since decided that federal defenses do not provide a basis for removal.").

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OBJECTION TO JURISDICTION

Neither this Court, nor any other Federal court, has jurisdiction over this case because the diversity statute does not apply, and there is no claim, "arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, allowing for removal jurisdiction under 28 U.S.C. § 1441(b).

STATEMENT OF THE CASE

On or September 19, 2000, Plaintiff Marie Anderson, and twenty-five (25) other persons, filed a Complaint in the Circuit Court of Barbour County, Alabama, Clayton Division, against defendants H & R Block, Inc. ("H & R Block"), Beneficial National Bank, and Beneficial Tax Masters, Inc. (collectively referred to herein as "Beneficial"). The factual allegations of the Complaint are that Plaintiffs went to H & R Block, and were participants in the H & R Block tax refund anticipation loan program. A tax refund anticipation loan is where a taxpayer is given a short term loan from Beneficial in exchange for a pledge of an anticipated tax refund. The allegations of the Complaint are that the interest rate paid by Plaintiffs for the tax refund anticipation loans was higher than the rate disclosed to the plaintiffs, that Defendants utilized unreasonable repayment periods to calculate the interest rate, and that the amount charged for interest was in excess of that allowed by the State of Alabama. The causes of action in the Complaint are for fraud (Count I); suppression (Count II); breach of fiduciary duty (Count III); for the charging of an excessive interest rate under Ala. Code § 8-8-1 (1975) (Count IV); and for violation of the Alabama Mini-Code (Count V).

Defendants removed the case to the District Court for the Middle District of Alabama, asserting complete preemption of Plaintiffs' usury claims under the National Bank Act. On November 22, 2000, Plaintiffs timely filed a Motion to Remand. On December 14, 2000, the District Court entered an Order denying Plaintiffs' Motion to Remand the case to state court. However, the District Court certified its Order denying Plaintiff's remand motion for interlocutory appeal to the Eleventh Circuit Court of Appeals. On April 3, 2002, the Eleventh Circuit reversed the District Court's Order denying Plaintiff's Motion to Remand, and remanded the case for further proceedings consistent with its opinion. Both Beneficial and H & R Block have filed Petitions for a Writ of Certiorari with this Court.

STATUTORY PROVISIONS INVOLVED

In addition to the provisions set forth in the petitions, Ala. Code § 8-8-1 (1975) is also involved.

REASONS FOR DENYING THE PETITION

Petitioners point to the case of *M. Nahas & Co., Inc. v. First National Bank*, 930 F.2d 608 (8th Cir. 1991), as an example of a split in the circuits such that certiorari ought to be granted in this case. However, neither this opinion, nor its progeny, *Krispin v. May Dept. Stores Co.*, 218 F.3d 919 (8th Cir. 2000), compel this Court to exercise its limited jurisdiction.

Supreme Court Rule of Procedure 10 sets forth factors to be considered in granting a Petition for Writ of Certiorari. One of those is when a Circuit Court has entered a decision in conflict with the decision of another Circuit "on the same

important matter." Sup. Ct. R. 10(a). While the Eighth Circuit's opinion does completely preempt a state law usury claim, even the decisions relied upon by Defendant do not stand for the proposition than any claim that may be defensively preempted by the National Banking Act is necessarily completely preempted by the Act such that a federal court has jurisdiction.

In *M. Nahas*, the Court held that, "in areas other than usury, national banks have been denied removal even though the National Bank Act would ultimately control all or part of plaintiffs' state law action." *M. Nahas*, 930 F.2d at 611, citing *Gully v. First National Bank*, 627 F.2d 843 (8th Cir. 1980). In *M. Nahas*, the Court not only affirmed the denial of the plaintiffs' motion to remand, but also dismissed the case based on the statute of limitations, thereby ending the case. However, that would not be the situation here. First, if Defendants' arguments are carried to their logical end, the claims would first be completely preempted, and then the claim for usury would be defensively preempted. This would leave Plaintiffs' fraud, suppression, breach of fiduciary duty, and Alabama mini-code claims in federal court with no jurisdictional basis. Apparently, however, that is what Defendants seek in this case, complete field preemption of any claim that in any way touches or concerns the National Bank Act.[1] That is not what the *M. Nahas* decision stands

1. Any question that what Defendants seek to accomplish here is much broader than simply having usury claims completely preempted is answered by the activities of these same two defendants in the case of *Hare, et al. v. H & R Block and Beneficial*, Case No. CV-02-C-C-1848-W, pending in the United States District Court for the Northern District of Alabama (copies of the Complaint and Order denying Motion to Lift Stay and Remand to State Court attached

(Cont'd)

for, and its not even the basis upon which Defendants seek to graft federal jurisdiction on in this action. In both *M. Nahas* and *Krispin*, the Court was dealing with a claim of usury, without regard or consideration as to the implications of complete or field preemption on other claims even the Eighth Circuit has not found to provide basis for removal. The alleged "split" occurred in cases with a key factual distinction. In *M. Nahas*, the case was due to be dismissed

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(Cont'd)

hereto as Appendices AI and AII). *Hare* is a tax refund anticipation loan case, with a factual scenario very similar to the case *sub judice*. However, the Complaint does not contain a cause of action for the charging of a usurious interest rate. Despite the absence of a claim that even has the National Bank Act as a defense, Defendants have successfully managed to remove the case, and keep it in Federal Court, on preemption grounds. This was done despite the Eighth Circuit opinion in *First National Bank of Aberdeen v. Aberdeen National Bank*, 627 F.2d 843 (8th Cir. 1980). In *First National Bank of Aberdeen*, the same Eighth Circuit that decided the *M. Nahas* case held, in a case wherein the defendants sought preemption based on the National Bank Act, as follows:

> These quoted passages clearly suggest that the *Gully* Court believed a defensive assertion of preemption did not give rise to federal question jurisdiction.
>
> * * *
>
> But however *Avco* may be interpreted in special circumstances, we are not persuaded that the Supreme Court in *Avco* intended to invalidate the generally accepted principle that defensive assertion of federal preemption in response to a state law claim may not constitute ground for removal.

First National Bank of Aberdeen, 627 F.2d at 852.

once the doctrine of complete preemption was applied. In this case, this Court would have to go even a step further and confer federal jurisdiction over state law claims that do not even suggest a defense of ordinary preemption. Even the Eighth Circuit has decided this cannot stand. *See, M. Nahas, supra*. As such there is no true split here, and certainly not a split on "the same important matter."

A. *The Burden Is On Defendants To Show That State Law Causes Of Action Are Removable.*

It is well-established that the burden is on the shoulders of the removing party to prove that removal is proper, and to prove that the district court has jurisdiction over the removed case. *University of South Alabama v. American Tobacco Co.*, 168 F.3d 405, 411-12 (11th Cir. 1999); *see also Pacheco de Perez v. AT&T Co.*, 139 F.3d 1373 (11th Cir. 1998). Federal courts are of limited jurisdiction, and removal is not favored. A case will be remanded whenever jurisdiction is in doubt. *Burns v. Windsor Ins. Co.*, 31 F.2d 1092, 1095 (11th Cir. 1994). Moreover, a case cannot be removed on the basis of a federal defense, including the defense of preemption. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987).

The United States Supreme Court has recognized complete preemption of state law claims only in the rarest of circumstances. Those circumstances only exist where the preemptive force of the federal statute is so "extraordinary" that it "converts an ordinary common law complaint into one stating a federal claim for purposes of the well pled complaint rule." *Caterpillar, Inc.*, 482 U.S. at 393. These "extraordinary" circumstances have been recognized by the Supreme Court in only two areas: the Labor Management Relations Act of 1947 ("LMRA"); and the Employer

Retirement Income Security Act of 1974 ("ERISA"). *See Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968). (Section 301 of the LMRA "completely preempted" any state law cause of action for violation of mandatory arbitration clauses between an employer and a labor organization); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (Sections 502(a)(1)(B) and Section 502(f) of ERISA "completely preempt" employees common law contract and tort claims arising from the employer's insurer's termination of disability benefits under an ERISA Plan). *See also Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998) (Knowing that Supreme Court precedent allows only two instances of complete preemption). What Defendants wish to do now is to add a third category of complete preemption in the National Bank Act. However, even the Eighth Circuit does not go so far. *See, id.*

B. ***The Parameters Of The National Bank Act Fall Far Short Of What Is Necessary For "Complete" Or "Field" Preemption.***

Any discussion of complete preemption must begin with the recognition that complete preemption is an "extraordinary" remedy that the Court has been "reluctant" to expand. It must be recognized that, even where it does apply, complete preemption operates as an extraordinary departure from the well-pleaded complaint rule, which states that a case in which the plaintiff asserts only state law claims may not be removed to Federal court based on the existence of a federal defense — even the defense of ordinary preemption. *Caterpillar, Inc.*, 482 U. S. at 393. ("Congress has long since decided that federal defenses do not provide a basis for removal.")

1. *Difference Between Ordinary And Complete Preemption.*

Ordinary preemption is a defense that may be raised in a state court, as well as in federal court. As a defense, ordinary preemption does not appear in the plaintiff's well-pleaded complaint, and thus does not give the defendant the ability to remove a case to federal court. *Caterpillar, Inc.*, 482 U.S. at 393. Unlike the defense of ordinary preemption, the doctrine of complete preemption gives a defendant the ability to remove the case to federal court. *BLAB TV of Mobile, Inc. v. Comcast Cable Comm., Inc.*, 182 F.3d 851, 854 (11th Cir. 1999).

The Supreme Court has found complete preemption under only the two federal statutes related above. In *Metropolitan Life Ins. Co. v. Taylor*, 481 U. S. 58 (1987), the Supreme Court cautiously extended the doctrine of complete preemption to ERISA § 502(a) claims. However, the doctrine of complete preemption applies only where Congress has "clearly manifested an intent" to make a particular cause of action removable to a federal court. *Metropolitan Life Ins. Co.*, 481 U. S. at 66. The *Metropolitan Life* Court explained the difference between ordinary and complete preemption as such:

> Federal preemption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court. *Gulley v. First National Bank*, 1099 U.S. 109 (1936). One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely preempt a

> particular area that any civil complaint raising the select group of claims is necessarily federal in character. For twenty years, this Court has singled out claims preempted by § 301 of the LMRA for such special treatment.[2]

Metropolitan Life, 481.U. S. at 60. In *Taylor*, the Court noted that, "Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) [of ERISA] removable to federal court." *Id.* at 66. However, there is no similar "clear manifest of intent" to make causes of action within the scope of the National Bank Act removable to federal court. In fact, the *M. Nahas* Court specifically recognized that national banks have been denied removal of claims even though the National Bank Act would ultimately control all or part of a plaintiff's state law action. *M. Nahas*, 930 F.2d at 608.

2. *There Is No Evidence Of Any Intent To Displace State Causes Of Action By The National Banking Act.*

In order for there to be complete preemption, the preemptive force of a federal statute must be "so powerful" as to "displace entirely any state cause of action." In the LMRA context, the Courts have held that the congressional

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2. Defendant's concerns that somehow they are without the ability to use their ordinary preemption defense in the Alabama state courts is unfounded. Alabama courts have a long history of applying the doctrine of ordinary preemption to §§ 85 and 86 of the National Bank Act. *Helms v. First Alabama Bank, N.A.*, 386 So. 2d 450 (Ala. 1980); *Florence R. R. & Improvement Co. v. Chase National Bank*, 17 So. 720 (Ala. 1895). The denial of federal jurisdiction does not preclude the defense of preemption. *Smith v. GTE Corporation*, 236 F.3d 1292 (11th Cir. 2001).

intent is present to preempt any cause arising out of an employer/employee relationship covered by a collective bargaining agreement. This complete preemption power in the LMRA context has been stated in the following terms. "The necessary ground of decision [in Avco] was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'" *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983), quoted in *Metropolitan Life*, *supra*. It is clear, even under Eighth Circuit precedent, that the National Bank Act does not displace entirely any cause of action between a person and a national bank, or where the National Bank Act that is implicated. *See M. Nahas*, *First National Bank of Aberdeen*, *supra*. As such, the doctrine of complete preemption simply does not apply.

In fact, the text of the National Bank Act shows just the opposite. The text of the NBA shows that it was intended that National Banking Associations could be sued in the state courts. When Congress replaced the 1963 Act in 1964, the statutory language provided for "Suits, actions and proceedings, against any association under this act, may be had in any circuit, district, or territorial court . . . or in any state county, or municipal court in the county or city in which said association is located . . ." *Mercantile Nat'l Bank at Dallas v. Longdeau*, 371 U.S. 555 (1963), citing 13 Stat. 116-17. Even today the Act at 12 U.S.C. § 24 states that a National Association shall have the power, "To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." 12 U.S.C. § 24. Clearly, it was not the intent of Congress when the National Bank Act was granted, nor is it the intent today, that National Banking Associations only be subject to suit in the federal courts.

The subsections of the National Bank Act that are at issue in the present case were initially enacted as § 30 of the National Bank Act of 1864, which is now codified at 12 U.S.C. §§ 85-86[3] and state as follows:

> Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, **interest at the rate allowed by the laws of the State**, Territory or District where the bank is located, or at a rate of one per centum in excess of the discount rate on 90-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where the laws of any State a different rate is limited for banks organized under state laws, if the rate so limited shall be allowed for associations organized or existing in any such state under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve or charge a rate not exceeding 7 per centum, or one per centum in excess of the discount rate on 90-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in

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3. Sections 85 and 86 were enacted into law by Congress *before* the existence of federal jurisdiction as enacted under 28 U.S.C. § 1331. The first version of § 1331 was enacted on March 3, 1875, ch. 137, § 1, 18 Stat. 470. *See Franchise Tax Board of State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 8, 103 S. Ct. 2841, 2845, 77 L. Ed. 2d 420 (1983).

> advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States or a District of Columbia shall be at the rate allowed by the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. At the purchase, discount, or sale of a bonafide bill of exchange, payable to another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange per site drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

12 U.S.C. § 85 (emphasis added).

> The taking, receiving, reserving, or charging a rate of interest greater than is allowed by § 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: provided, that such action is commence within two years from the time the usurus transaction occurred.

12 U.S.C. § 86.

The National Bank Act, 12 U.S.C. § 85, vests the *states* with the authority to legislate and establish interest rate limitations. As such, it is highly unlikely that Congress intended to confer complete federal preemption through the adoption of the laws of the several states. *Cf. Butero v. Royal Maccabees Life Ins. Co.*, 174 F.3d 1207 (11th Cir. 1999) (super preemption applies when Congress comprehensively occupies a field of law and is necessarily federal in character). In this case, Appellees argue that the laws of Delaware control the loan interest rate, rather than the laws of Alabama, where the loans were issued. Yet, on the other hand, it is clear that the National Bank Act would *not* preempt or otherwise apply to an interest rate claim by an Alabama consumer against an Alabama bank. The same is true with any Delaware consumer against a Delaware bank. This in itself illustrates that the National Bank Act does not displace the field of state interest rate regulation.

In a thorough analysis of precedent on the issue, the United States District Court for the Southern District of Alabama ruled that the National Bank Act *does not* confer complete preemption over state law claims for excessive interest. In *Jones v. BankBoston, N.A.*, 115 F. Supp. 2d 1350 (S.D. Ala. Oct. 2, 2000), the Court engaged in a significant analysis of the Congressional intent and history of the National Bank Act.

> [T]he significance to complete preemption analysis of jurisdictional language paralleling that of the LMRA is dependent on whether the jurisdictional language was enacted after the 1968 *Avco*[4] decision; only then may it be inferred that

4. *Avco Corp. v. Aero Lodge No. 735, International Assoc. of Machinists & Aerospace Workers*, 390 U.S. 557, 88 S. Ct. 1235, 20 L. Ed. 2d 126 (1968).

> Congress, by its use of such language, desired to mimic the complete preemption embedded in the LMRA. Because the National Bank Act's jurisdictional provision was enacted a century before *Avco*, it cannot be construed as an effort to invoke complete preemption by parallelism . . . Even if closely parallel jurisdictional language carried any significance with respect to statutes enacted before 1968, the National Bank Act's jurisdictional provision does not closely parallel that of the LMRA.
>
> The most striking difference between the National Bank Act and the LMRA, however, lies in their treatment of state court jurisdiction; while the LMRA is silent, the National Bank Act expressly contemplates state court jurisdiction. Thus the National Bank Act's jurisdictional provision varies materially in every respect from the jurisdictional language common to the LMRA and ERISA. Such a jurisdictional provision cannot be said to "closely parallel" the LMRA for purposes of complete preemption analysis.

Jones, 115 F. Supp. 2d at 1358. The *Jones* Court went on to analyze the faulty reasoning of the *M. Nahas* decision.

> The Eighth Circuit's reliance on the existence of an "exclusive federal remedy" without any further showing of congressional intent is not only inconsistent with *BLAB TV*, by which this Court is bound, but also appears to contradict *Metropolitan Life v. Taylor* itself . . . were the existence of an "exclusive federal remedy" the

> only requirement for complete preemption, the *Metropolitan Life* Court would have concluded its analysis at this point and declared the Plaintiffs' claims completely preempted. Rather than doing so, the Court noted it would be "reluctant" to grant complete preemption on so slender a basis and instead launched into its explication of the statute and its legislative history. . . . This Court is aware of no other appellate court utilizing the Eighth Circuit's lenient test for complete preemption and is neither empowered nor inclined to adopt it.

Jones, 115 F. Supp. 2d at 1356 (citations omitted in original).

In *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987), the Supreme Court held that express statutory language and Congressional intent to displace entirely any state cause of action was *required* for the application of the doctrine of complete preemption. The Court examined language of the jurisdictional subsection of ERISA's civil enforcement provisions and determined that Congress had clearly manifested an intent to make state causes of action removable to federal court. *Taylor*, 481 U.S. at 65, 107 S. Ct. at 1547. The Supreme Court clarified its holding on complete preemption by stating that:

> [E]ven with a provision such as [ERISA] § 502(a)(1)(B) that lies at the heart of a statute with the unique pre-emptive force of ERISA, however, we would be reluctant to find that extraordinary preemptive power, such as has been found with respect to § 301 of the L.M.R.A., that converts an ordinary state common law complaint

> into one stating a federal claim for purposes of the well-pleaded Complaint rule.

Taylor, 481 U.S. at 65, 107 S. Ct. at 1547 (internal citations omitted).

The Third Circuit, in the case of *Spellman v. Meridian Bank (Delaware)*, 1995 WL 764548,[5] explained the Supreme Court precedent as to complete preemption in words far more elegant than this writer could summon.

> The Supreme Court has held affirmative evidence of Congressional intent could be the touchstone of the federal district court's removal jurisdiction and, as discussed above, the court has found such intent only rarely. The complete preemption doctrine was originally rooted in a cause of action arising under § 301 of the L.M.R.A. The court extended the doctrine reluctantly, in *Metropolitan Life*, to an action arising under ERISA. The court wrote that it did so only because "ERISA's civil enforcement provisions closely parallels [sic] that of § 301 of the L.M.R.A.," and because explicit language in the ERISA Conference Report analogized the ERISA provision to the L.M.R.A.

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5. The *Spellman* opinion is available as a 1995 West law cite, and was not published in the Federal Reporter. Following the panel opinion, the Third Circuit voted to grant rehearing *en banc* and vacated the panel opinion. The appeal was dismissed before any *en banc* opinion was issued. The appeal was dismissed in July of 1996 pursuant to the Supreme Court's ruling in *Smiley v. CitiBank*, 517 U.S. 735 (1996) which involved a technical definition of "interest" and did not involve the issue of complete preemption.

language. In the absence of explicit direction from Congress, the court wrote:

> [e]ven with a provision such as 502(a)(1)(B) [the jurisdictional provision] that lies at the heart of a statute with the unique pre-emptive force of ERISA . . . we would be reluctant to find that extraordinary pre-emptive power, such as that has been found with respect to 301 of the L.M.R.A., that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.

Neither the National Bank Act nor DIDA contains a jurisdictional provision evidencing Congressional intent to permit removal of the sort relied upon in *Avco* and *Metropolitan Life*. Nor have the banks pointed to Congressional language suggesting that parties may bring suit against banks in federal court without regard to the citizenship of the parties or the amount in controversy.

Congressional intent to permit removal based on complete preemption would be difficult to divine from the legislative history of the National Bank Act, because the act was passed in 1864, pre-dating federal question jurisdiction, the well pleaded complaint rule, and the doctrine of complete preemption. The banks argue, nonetheless, that Congress evidenced an intent to provide an exclusive source of relief for claims

> of overcharge that, coupled with the general federal provision allowing for removal of federal question cases, demonstrates Congressional intent to allow removal. However, the defendants point to nothing in the legislative history of §§ 85 and 86 that present the sort of clear indication of Congressional intent we have looked for in the past.
>
> There appears to be no indication that Congress intended to completely preempt the regulation of national banks or federally-insured state lending institutions. Therefore we will reverse the judgments of the district court that found complete preemption.

Spellman, 1995 WL 764548, *6-7 (internal quotations omitted).

The requirements specifically articulated by the Supreme Court are not met in this case — there is neither statutory language nor Congressional intent that the National Bank Act displaces entirely the Plaintiffs' state law causes of action.[6] Further examination of the absence of complete

6. Defendants' assertion that congressional intent cannot possibly be gleaned as to removal under the National Bank Act because it was enacted before general federal question jurisdiction, and before removal was allowed, is not true. First, when Congress enacted the National Bank Act in 1864, it provided that suit could be brought in federal or state court. *See*, *supra*. Moreover, had the Congress wished to provide for removal of suits under the National Bank Act, it could have done so. At the time, Congress had provided in a handful of civil acts that federal law would both provide a defense, and while for removal of a cause of action from state to

(Cont'd)

preemption in the National Bank Act by the District Court for the Southern District of Florida has held that banking is not an area in which Congress has evidenced an intent to occupy the entire field to the exclusion of the states, and thus state legislatures may legislate in all areas not expressly or impliedly preempted by federal legislation. *Video Trax, Inc. v. NationsBank, N.A.*, 33 F. Supp. 2d 1041 (S.D. Fla. 1998).

> The determination of the maximum amount of interest which may be charged for the use of money loaned has always been within the police power of the state, and the details of the exceptions to the legislation have rested within the discretion of the state legislature. In § 85 of the Bank Act, Congress expressly and unambiguously stated that a national bank was subject to the interest provision of the laws of the state in which the bank was located.

Video Trax., 33 F. Supp. 2d at 1050 (S.D. Fla. 1998) (internal citations omitted).

(Cont'd)

federal court. *See, e.g.*, Act of March 3, 1863, 12 Stat. 755 (amended by the Act of May 11, 1866, 14 Stat. 46), Congress provided for a federal defense and provided the right of removal of civil or criminal actions arising out of acts committed under federal authority during the Civil War. *See Mayor & Alderman of City of Nashville v. Cooper*, 73 U.S. 247 (1867); *Michael T. Collins, the Unhappy History of Federa' Question and Removal*, 71 Iowa Law Review 717, 720-21 (1986). Simply put, had Congress, at the time, it intended that suits arising out of the National Bank Act be litigated only in the state courts, Congress had the ability to provide for such extraordinary jurisdiction. It chose not to do so with regard to the National Bank Act.

There is no question that interest rates are determined by state law. There is no legislative language evidencing Congressional intent that state-law actions relating to interest rate claims against national banks are to be considered as arising under federal law for purposes of removal jurisdiction. There is no indication that the National Bank Act's jurisdictional language is intended to function in the same manner of Section 301 of the LMRA, or § 502(a) of ERISA, pursuant to the guidance of the Supreme Court in *Metropolitan Life v. Taylor*. *See BLAB TV*, 132 F.3d at 857. Defendants cannot extrapolate the doctrine of complete preemption and claim that the laws of the State of Delaware, through the application of 12 U.S.C. § 85 and "super preemption", create federal subject matter jurisdiction.

At best, the provisions of the National Bank Act only create a defense based upon the factual application of interest regulations between the several States and relies on interpretation of the *laws of a particular state*. Therefore, removal of the Plaintiffs' case was improper since a case cannot be "removed on the basis of a federal defense, including the defense of preemption." *Caterpillar*, 482 U.S. at 393; *Kemp v. International Bus. Mach. Corp.*, 109 F.3d 708, 714 (11th Cir. 1997).

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — COMPLAINT

IN THE CIRCUIT COURT OF SUMTER COUNTY, ALABAMA

Civil Action No.: _____

MARTHA SUE HARE; OTIS JENNINGS; MILDRED P. SMITH; and WILLIE E. SMITH;

Plaintiffs,

vs.

H & R BLOCK EASTERN TAX SERVICES, INC.; H & R BLOCK, INC.; BENEFICIAL NATIONAL BANK; and BENEFICIAL TAX MASTERS, INC.,

Defendants.

There may be other entities whose true names and identities are unknown to the Plaintiffs at this time who may be legally responsible for the claim(s) set forth herein who may be added by amendment by the Plaintiffs when their true names and identities are accurately ascertained by further discovery. Until that time, the Plaintiffs will designate these parties in accordance with Rule 9(h), Alabama Rules of Civil Procedure. The word "entity" as used herein is intended to refer to and include any and all legal entities including individual persons, any and all forms of partnerships, any and all types of corporations and unincorporated associations. The symbol by which these party Defendants are designated is intended to include more than one entity in the event that discovery reveals that the descriptive characterization of the

symbol applies to more than one "entity." In the present action, the party Defendants which the Plaintiffs must include by descriptive characterization are as follows: "A", "B" & "C", whether singular or plural, being the entity that was the finance company described below that committed the wrongful acts alleged in Plaintiffs' Complaint, and/or the entity on whose behalf the agent in question was acting; "D", "E" & "F", whether singular or plural, being that entity or persons, other than those entities and persons described above, which is the successor in interest, or the assignee, or which undertook the duties, or assumed the liabilities of any of the entities described herein. Plaintiff alleges that the identities of the fictitious party-Defendants are otherwise unknown at this time, or, if known, their identities as proper party-Defendants are not known, but their true names will be substituted by amendment when ascertained.

COMPLAINT

1. Plaintiff, Martha Sue Hare, is a resident citizen of Sumter County, Alabama and is over the age of nineteen years.

2. Plaintiff, Otis Jennings, is a resident citizen of Sumter County, Alabama and is over the age of nineteen years.

3. Plaintiff, Mildred P. Smith, is a resident citizen of Sumter County, Alabama and is over the age of nineteen years.

4. Plaintiff, Willie E. Smith, is a resident citizen of Sumter County, Alabama and is over 5.The Defendant H & R Block Eastern Tax Services, Inc. (hereinafter "Eastern Tax Services")

is a foreign corporation doing business in Sumter County, Alabama at all times relevant to the facts herein.

6. The Defendant H & R Block, Inc. (hereinafter "HRB) is a foreign corporation doing business in Sumter County, Alabama at all times relevant to the facts herein.

7. The Defendant Beneficial National Bank (hereinafter "Beneficial) is a foreign corporation doing business in Sumter County, Alabama at all times relevant to the facts herein. Upon information and belief, Beneficial was acquired and/ or merged with Household International, Inc. on or about June 1998.

8. The Defendant Beneficial Tax Masters (hereinafter "Tax Masters") is a foreign corporation doing business in Sumter County, Alabama. Upon information and belief, Tax Masters was acquired and/or merged with Household International, Inc. on or about June 1998.

9. There may be other entities whose true names and identities are unknown to the Plaintiffs at this time who may be legally responsible for the claim(s) set forth herein who may be added by amendment by the Plaintiffs when their true names and identities are accurately ascertained by further discovery. Until that time, the Plaintiffs will designate these parties in accordance with Rule 9(h), Alabama Rules of Civil Procedure. The word "entity" as used herein is intended to refer to and include any and all legal entities including individual persons, any and all forms of partnerships, any and all types of corporations and unincorporated associations. The symbol by which these party Defendants are designated

is intended to include more than one entity in the event that discovery reveals that the descriptive characterization of the symbol applies to more than one "entity." In the present action, the party Defendants which the Plaintiffs must include by descriptive characterization are as follows: "A", "B" & "C", whether singular or plural, being the entity that was the finance company described below that collected fees or interest and/or committed the wrongful acts alleged in Plaintiffs' Complaint, and/or the entity on whose behalf the agent in question was acting; "D", "E" & "F" whether singular or plural, being that entity or persons, other than those entities and persons described above, which is the successor in interest, or the assignee, or which undertook the duties, or assumed the liabilities of any of the entities described herein. Plaintiff alleges that the identities of the fictitious party-Defendants are otherwise unknown at this time, or, if known, their identities as proper party-Defendants are not known, but their true names will be substituted by amendment when ascertained.

JURISDICTION AND VENUE

10. The events giving rise to the claims in this Complaint originated in Sumter County, Alabama. Upon information and belief, Defendants and Fictitious Party Defendants presently conduct business by agent in Sumter County, Alabama, and have done so at all times relevant to this Complaint. Venue is proper in the Circuit Court of Sumter County, Alabama as to Defendants and Fictitious Defendants pursuant to *Ala. Code* § 6-3-7 (1975) and Alabama Rule of Civil Procedure.

Appendix A

11. Plaintiffs do not plead any cause of action under any federal law. Each Plaintiff individually seeks judgment against Defendants joint and severally for compensatory damages and punitive damages not to exceed $74,900 per named Plaintiff.

FACTUAL ALLEGATIONS

12. Each named Plaintiff retained the services of the Defendants as tax professionals.

13. The Defendants undertook a confidential relationship with each Plaintiff and established the trust and confidence for professional advice for taxation matters.

14. Defendants held themselves out to be financial advisors functioning on behalf of the interest of the Plaintiffs.

15. Defendants made refund anticipation loans to each of the named Plaintiffs and charged the Plaintiffs for tax refund anticipation loans.

26. Upon information and belief, Defendants maintained a fee sharing agreement under which the Defendants profited by making the refund anticipation loans. The assessment of costs and fees has damaged the Plaintiffs.

17. Defendants have wrongfully charged Plaintiffs for excessive fees relating to refund anticipation loans.

Appendix A

COUNT I
INTENTIONAL MISREPRESENTATIONS

18. Plaintiffs reallege and incorporate by reference the foregoing paragraphs 1 through 17 and further aver as follows:

19. Defendants misrepresented material facts to the Plaintiffs which facts include, but are not limited to, the following:

(a) the costs paid by the Plaintiffs.

(b) the Plaintiffs fees and costs would be substantially higher than those disclosed due to the Defendants' receipt of loan repayments.

(c) the Defendants utilized unreasonable repayment periods to calculate the costs of the loan.

20. Defendants actions constituted conduct involving actual malice, or, in the alternative, were a part of a pattern or practice of intentional wrongful conduct.

21. Defendants intended for Plaintiffs to rely upon the misrepresentations described hereinabove, and Plaintiffs reasonably and justifiably relied on those representations to their detriment by:

(a) paying excessive interest and fees to the Defendants;

(b) foregoing the use of their money; and

(c) suffering mental anguish.

22. As a direct and proximate consequence of Defendants actions, Plaintiffs have been injured and damaged as identified herinabove.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs demand judgment against Defendants jointly and severally for compensatory damages and punitive damages not to exceed $74,900 per named Plaintiff, in an amount to be determined by a jury.

COUNT II
SUPPRESSION OF MATERIAL FACTS

23. Plaintiffs reallege and incorporate by reference the foregoing paragraphs 1 through 22 and further aver as follows:

24. Defendants, withheld, concealed, and suppressed from Plaintiffs certain material facts which the Defendants were under a duty to communicate to them, based upon a confidential relationship of the parties or the facts of this particular case.

25. The material facts which the Defendants withheld, concealed, and suppressed from Plaintiffs include, but are not limited to, the following:

(a) the loan cost paid by the Plaintiffs exceeded the costs to the plaintiffs.

(b) the Plaintiffs' costs would be substantially higher than the costs disclosed due to the Defendants' receipt of loan repayments.

(c) the Defendants utilized unreasonable repayment periods to calculate the loan costs.

26. Defendants intended for Plaintiffs to rely upon the suppressions described hereinabove, and Plaintiffs reasonably and justifiably relied on those suppressions to Plaintiffs' detriment by:

(a) paying excessive costs and fees to the Defendants;

(b) foregoing the use of their money; and

(c) suffering mental anguish.

27. Defendants' actions were fraudulent, malicious, wanton, gross and/or oppressive, and were intended to injure or defraud Plaintiffs.

28. Defendants' actions constituted conduct involving actual malice, or, in the alternative, were a part of a pattern or practice of intentional wrongful conduct.

29. As a direct and proximate consequence of Defendants' conduct, Plaintiffs have been injured and damaged as described hereinabove.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs demand judgment against Defendants jointly and severally for compensatory damages and punitive damages not to exceed $74,900 per named Plaintiff, in an amount to be determined by a jury.

COUNT III
BREACH OF FIDUCIARY DUTY

30. Plaintiffs reallege and incorporate by reference each fact contained in paragraphs 1 through 29 above, and in the counts below, as if pleaded separately herein.

31. By virtue of the relationship of the Plaintiffs and Defendants, the facts suppressed by the Defendants, and the superior knowledge and bargaining position of the Defendants, a confidential and fiduciary relationship arose between the Plaintiffs and the Defendants. Plaintiffs reposed confidence and trust in Defendants, and relied on Defendants' duties to act in the best interest of the Plaintiffs.

32. Defendants breached their duty to the Plaintiffs and failed to disclose the Defendants' licencing agreement. Defendants' breach their duty and failed to notify the Plaintiffs of a conflict of interest in profiting from the licensing arrangement.

33. Plaintiffs further relied on Defendants' actions and representations and were induced by Defendants to pay excessive costs and fees, when Plaintiffs otherwise would not have paid excessive costs and fees.

Appendix A

34. Defendants had a duty to make financial decisions in the interest of the Plaintiffs.

35. Defendants and their agents recklessly breached their fiduciary duty to Plaintiffs by suppressing the following material facts:

(a) the costs paid by the Plaintiffs exceeded the costs disclosed to the plaintiffs.

(b) the Plaintiffs costs would be substantially higher than that disclosed due to the Defendants' receipt of loan repayments.

(c) the Defendants utilized unreasonable repayment periods to calculate the loan costs.

36. Defendants breached their fiduciary duties described hereinabove, and Plaintiffs suffered damages as follows:

(a) paying excessive costs and fees to the Defendants;

(b) foregoing the use of their money; and

(c) suffering mental anguish.

37. As a direct and proximate consequence of Defendants actions, Plaintiffs have been injured and damaged as identified herinabove.

Appendix A

WHEREFORE, PREMISES CONSIDERED, Plaintiffs demand judgment against Defendants jointly and severally for compensatory damages and punitive damages not to exceed $74,900 per named Plaintiff, in an amount to be determined by a jury.

PLAINTIFFS DEMAND TRIAL BY STRUCK JURY

APPENDIX B — IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION DATED AND FILED SEPTEMBER 6, 2002

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

Civil Action No.: CV-02-C-1848-W

MARTHA SUE HARE; OTIS JENNINGS; MILDRED P. SMITH; and WILLIE E. SMITH;

Plaintiffs,

vs.

H & R BLOCK EASTERN TAX SERVICES, INC.; H & R BLOCK, INC.; BENEFICIAL NATIONAL BANK; and BENEFICIAL TAX MASTERS, INC.,

Defendants.

Filed September 6, 2002

PLAINTIFFS' MOTION TO LIFT STAY AND REMAND TO STATE COURT

COME NOW the Plaintiffs, Martha Sue Hare, Otis Jennings, Mildred P. Smith, and Willie E. Smith, by and through their attorney of record, and respectfully request that this Honorable Court lift the stay in this case and order remand to state court. In support of this motion, Plaintiffs state as follows:

Appendix B

A nearly identical case filed against Beneficial National Bank an H&R Block on behalf of several residents of Piekens County, Alabama was recently remanded to state court for lack of subject matter jurisdiction. *See Tracy Brewer, et al. v. H&R Block Eastern Tax Services, Inc., et al.*, CV-02-N-1772-W (N.D. Ala. Sept. 3, 2002) (J. Nelson) (See attached Exhibit "A"). In the *Brewer* case, the plaintiffs allege identical causes of action against the same defendants in the instant case. In that case, District Judge Edwin Nelson denied defendants' Motion to Stay and Ordered remand to state court. The court stated as follows:

OVERRULED WITHOUT PREJUDICE

s/ U.W. Clemon 10/9/02
JUDGE DATE